

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTWINE HACKNEY,

Plaintiff,

vs.

ELLIS ISLAND CASINO AND BREWERY,

Defendant.

Case No. 2:12-cv-01786-JCM-CWH

FINDINGS AND
RECOMMENDATION

This matter is before the Court on Plaintiff's Amended Complaint (#9), filed on January 3, 2013. Plaintiff is proceeding in this action *pro se*. On December 4, 2012, the Court ordered that the Amended Complaint (#6) be dismissed without prejudice and granted Plaintiff thirty (30) days to file an amended complaint correcting the noted deficiencies.

I. Screening the Second Amended Complaint

Upon granting a request to proceed *in forma pauperis*, a court must additionally screen the complaint pursuant to § 1915(a). Federal courts are given the authority to dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

Allegations of a *pro se* complaint are held to less stringent standards than formal pleading drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). When a court dismisses a complaint under § 1915(a), the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is

1 essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*, 232 F.3d
2 719, 723 (9th Cir. 2000). A properly pled complaint must provide a short and plain statement of
3 the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v.*
4 *Twombly*, 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed factual
5 allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the
6 elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Papasan v.*
7 *Allain*, 478 U.S. 265, 286 (1986)). The court must accept as true all well-pled factual allegations
8 contained in the complaint, but the same requirement does not apply to legal conclusions. *Iqbal*,
9 556 U.S. at 679. Mere recitals of the elements of a cause of action, supported only by conclusory
10 allegations, do not suffice. *Id.* at 678. Secondly, where the claims in the complaint have not
11 crossed the line from plausible to conceivable, the complaint should be dismissed. *Twombly*, 550
12 U.S. at 570.

13 Additionally, the court cannot refer to a prior pleading in order to make an amended
14 complaint complete. Local Rule 15-1 requires that an amended complaint be complete in itself
15 without reference to any prior pleading. This is because, as a general rule, an amended complaint
16 supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once
17 plaintiff files an amended complaint, the original pleading no longer serves any function in this
18 case. Therefore, in an amended complaint, each claim and the involvement of the defendant must
19 be sufficiently alleged.

20 **A. Diversity Jurisdiction**

21 Pursuant to 28 U.S.C. § 1332, federal district courts have original jurisdiction over civil
22 actions in diversity cases “where the matter in controversy exceeds the sum or value of \$75,000”
23 and where the matter is between “citizens of different states.” Diversity jurisdiction does not exist
24 because both parties are citizens of the State of Nevada.

25 **B. Federal Question Jurisdiction**

26 As a general matter, federal courts are courts of limited jurisdiction and possess only that
27 power authorized by the Constitution and statute. *See Rasul v. Bush*, 542 U.S. 466, 489 (2004).
28 Pursuant to 28 U.S.C. § 1331, federal district courts have original jurisdiction over “all civil actions

arising under the Constitution, laws, or treaties of the United States.” “A case ‘arises under’ federal law either where federal law creates the cause of action or ‘where the vindication of a right under state law necessarily turn[s] on some construction of federal law.’” *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1088-89 (9th Cir. 2002) (quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983)). The presence or absence of federal-question jurisdiction is governed by the “well-pleaded complaint rule.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Under the well-pleaded complaint rule, “federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Id.*

Here, Plaintiff submitted his Second Amended Complaint on a form entitled Civil Rights Complaint pursuant to 42 U.S.C. § 1983 alleging discrimination based on race, color, sex, and age. A claim under this statute invokes the Court’s federal jurisdiction. However, because the Court finds that Plaintiff failed to properly bring a claim under Section 1983 (see discussion below), federal question jurisdiction does not exist at this time.

C. 1983 Claim

To state a claim under Section 1983, a plaintiff must plead that the named defendant (1) acted “under color of state law” and (2) “deprived the plaintiff of rights secured by the Constitution or federal statutes.” *Gibson v. U.S.*, 781 F.2d 1334, 1338 (9th Cir. 1986); *see also West v. Atkins*, 487 U.S. 42, 48 (1988); *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006). The Court’s prior Order informed Plaintiff that he failed to state sufficient facts to find that a private party defendant acted under the color of state law. Plaintiff’s Amended Complaint failed to correct this deficiency and therefore, the Court finds that Plaintiff failed to provide sufficient facts to state a claim for relief under Section 1983.

D. Title VII Claims

Nowhere in his Second Amended Complaint does Plaintiff allege when he received the Notice of Suit Rights letter from the Equal Employment Opportunity Commission. Local Rule 15-1 requires that an amended complaint be complete in itself without reference to any prior pleading. Therefore, Plaintiff failed to provide sufficient evidence that this action was timely filed.

Furthermore, as discussed in the prior Order, Plaintiff may have intended to file a claim for

1 race discrimination and retaliation in violation of Title VII of the Civil Rights Act (“Title VII”), 42
 2 U.S.C. § 2000e et seq. Plaintiff’s Second Amended Complaint failed to cite this statute. In order
 3 to prove a prima facie case of discrimination in violation of Title VII, Plaintiff must establish the
 4 following: (a) he belonged to a protected class; (b) he was qualified for his job; (c) he was
 5 subjected to adverse employment action; and (d) similarly situated employees not in his protected
 6 class received more favorable treatment. *Moran v. Selig*, 447 F.3d 748, 753 (9th Cir. 2006) (citing
 7 *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 818 (9th Cir. 2002)). Plaintiff failed to provide sufficient
 8 facts to state a claim for racial discrimination under Title VII.

9 Similarly, to state a claim for retaliation in violation of Title VII, Plaintiff must establish the
 10 following: (a) he engaged in a protected activity, (b) he suffered an adverse employment action, and
 11 (c) there was a causal link between the protected activity and the adverse employment action.
 12 *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1093-94 (9th Cir. 2008). Plaintiff failed to provide
 13 sufficient facts to state a cognizable retaliation claim under Title VII. Therefore, despite being
 14 given leave to amend his complaint, Plaintiff has failed to state a claim upon which relief can be
 15 granted.

16 Based on the foregoing and good cause appearing therefore,

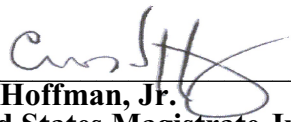
17 **RECOMMENDATION**

18 **IT IS HEREBY RECOMMENDED** that Plaintiff’s Amended Complaint (#9) be
 19 **dismissed with prejudice** because Plaintiff failed to state a claim upon which relief can be granted.

20 **NOTICE**

21 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be
 22 in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has
 23 held that the courts of appeal may determine that an appeal has been waived due to the failure to
 24 file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit
 25 has also held that (1) failure to file objections within the specified time and (2) failure to properly
 26 address and brief the objectionable issues waives the right to appeal the District Court’s order
 27 and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153,
 28 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 9th day of January, 2013.



C.W. Hoffman, Jr.
United States Magistrate Judge